

## LEGAL & ADMINISTRATIVE OVERVIEW

### *Prepared for Draft 2*

Chapter 23-1 (*Introduction*)  
Chapter 23-2 (*Administrative Procedures*)  
Chapters 23-5 (*Subdivision*)

October 11, 2017

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## INTRODUCTION

The purpose of this report is to help the City Council, Planning Commission, the Zoning and Platting Commission, and other stakeholders involved in the CodeNEXT process to better understand the main administrative sections of the new Code. To this end, the report provides an overview of Chapters 23-1 (*Introduction*), 23-2 (*Administrative Procedures*), 23-5 (*Subdivision*), and a few other key provisions, with particular emphasis on:

- (a) *How these chapters differ from current provisions of the Land Development Code, including the key issues they seek to address;*
- (b) *Changes and refinements made between Drafts 1 and 2, with particular emphasis on responses to public comment; and*
- (c) *Areas for further consideration in Draft 3.*

The material covered in these chapters requires greater legal context to understand than other sections of CodeNEXT and was prepared with guidance from the Law Department, in consultation with the CodeNEXT Core Team. Because of the nature of the topics covered, this report is broader in scope than staff reports on other aspects of CodeNEXT.

To make the material accessible and understandable, this report focuses on key themes and overall topic areas. Code sections that are known to be of interest to commissioners and the larger community are described in greater detail, as are provisions that differ most substantially from the current Land Development Code. In contrast, sections that are more technical or have limited impact are given less detailed treatment and are generally covered only as part of an overview of the “Article” or “Division” in which they appear.

In addition to providing a general guide to these chapters of the new the Code, the CodeNEXT Team hopes this report will help commissioners to hone in on key policy areas that are of most interest to you and provide a useful point of reference for discussions at future meetings.

CodeNEXT Core Team  
October 6, 2017

## CHAPTER 23-1 (INTRODUCTION)

### A. Overview

Most municipal land use codes include a standalone introductory chapter that provides a legal and policy framework to help guide the interpretation, administration, and enforcement of the code's substantive regulations and procedures. Introductory chapters are useful in addressing global issues that affect the entire Code and in articulating the legal basis for a city's development regulations.

Chapter 23-1 is Austin's first attempt at crafting an overall introduction for the Land Development Code. Parts of this chapter expand on material that is touched on in various places throughout the current Land Development Code. However, most of Chapter 23-1 consists of new provisions that address important foundational concepts which are not clearly articulated in current code, but which often arise in the implementation, enforcement, and defense of the City's land use regulations.

Following is a general description of the major divisions in Chapter 23-1:

#### **DIVISION 23-1A-1: TITLE, PURPOSE, AND SCOPE**

Division 23-1A-1 serves three primary purposes:

- **Section 23-1A-1 (*Title and Citation*)** provides guidance for citing the Land Development Code, both within the Code itself and in other documents referring to the Code.
- **Section 23-1A-2 (*Purpose*)** provides an overall statement of purpose that emphasizes the Comprehensive Plan as the basis for the City's regulations and describes specific objectives behind each major element of the new Code.
- **Section 23-1A-3 (*Scope and Effect*)** broadly describes the scope of activities that are subject to the Land Development Code and the effect of the Code on private parties, City staff, and other governmental bodies. This provides a foundation for later sections of the Code, including the more detailed applicability and enforcement provisions in Chapter 23-2.

## **DIVISION 23-1A-2: AUTHORITY**

Division 23-1A-2 covers several important concepts related to the legal authority of City decision-makers, including staff, Council, and boards and commissions:

- **Section 23-1A-2010 (*Scope of Municipal Authority*)**

References key state and local laws that provide a basis for the adoption and enforcement of the Land Development Code and formally delegates authority under the Code to designated city officials.

- **Section 23-1A-2020 (*Implied Authority*)**

Vests city officials with general authority to take actions that are necessary to administer and enforce the Code, even if a particular action is not specifically listed in Code. Disputes over staff authority come up from time to time, since it's impossible to describe every action required by staff to enforce or administer the Code.

For this reason, many city codes include general “implied authority” provisions similar to Section 23-1A-2020. In response to public comment, however, it should be emphasized that this section does not give the director authority to impose new regulations or reduce existing regulations administratively.

- **Section 23-1A-2030 (*Limitations on Authority*)** serves several purposes:

First, Section 23-1A-2030 establishes the Land Development Code as the controlling authority over land use and development within the City of Austin and its extraterritorial jurisdiction.

Second, this section requires the City to conduct its activities in compliance with the Code and states that any mistaken representations by staff regarding how the Code applies to a particular project are not binding and do not have the effect of waiving regulations. Similarly, this section provides that no City official can make “binding representations” regarding the outcome of matters that are subject to public hearings before a board or commission or the City Council. It does not, however, prohibit City staff from discussing pending cases with applicants or members of the community in order to help them better understand the process.

Finally, Section 23-1A-2030 includes fairly typical language describing the legal character and effect of City actions under the Land Development Code.

**DIVISION 23-1A-3:  
CLASSIFICATIONS OF APPLICATIONS AND DECISIONS**

The City has to wear many different hats in administering the Land Development Code. To help emphasize the different roles of the City Council, City staff, and appointed boards and commissions, this division provides an overview of the three main categories of decisions required under the Code—Legislative, Quasi-Judicial, and Administrative.

**DIVISION 23-1A-4:  
CONSISTENCY WITH COMPREHENSIVE PLAN**

Under the city charter, the Land Development Code must be consistent with the *Imagine Austin Comprehensive Plan*. This division of the Code memorializes the charter’s consistency requirement and provides general guidance for using the comprehensive plan to help guide discretionary decisions.

**DIVISION 23-1A-5:  
RULES OF INTERPRETATION**

This division spells out several guiding principles that inform how the Code is drafted and how it should be interpreted. Many of these principles apply legally, whether or not they are explicitly stated, but it’s useful to set them forth clearly in order to help ensure that the Code is interpreted and applied consistently.

Following are some of the more important principles of interpretation:

- Code requirements are “cumulative,” which means that a development subject to regulations in different parts of the Code has to comply with all of the regulations. A common example is impervious cover, which is regulated under both the City’s zoning and watershed regulations.
- Whenever possible, the Code should be interpreted so that all applicable provisions are given effect and none is rendered superfluous. However, if a conflict between different sections arises, then: (1) the more restrictive requirement prevails over the less restrictive; and (2) a provision that is

more specific to a particular development controls over a provision that is more general in scope.

- Purpose statements and illustrations are not binding, but are meant to provide context and aid in understanding the intent of Code requirements. This is important to clarify, as CodeNEXT represents a move towards including more explanatory material than prior versions of the Land Development Code.

Additionally, if a regulation is “incomplete” as applied to a particular development, this division gives the responsible director authority to adapt procedures or requirements from other parts of the Code in order to give effect to the requirement. This comes up from time to time, in a variety of contexts. For example, staff may determine that a supplemental application or other submittal is necessary in order to review for compliance with a particular requirement or may need to refer to calculation methods or other procedures that are not explicitly referenced.

### **ARTICLE 23-1B: RESPONSIBILITY FOR ADMINISTRATION**

This portion of Chapter 23-1 provides an overview of the functions and authority of the Council, boards & commissions, and City departments in administering the Land Development Code. It doesn’t change the divisions of authority that exist today, but it explains more fully the different roles that each unit of City government plays in planning and development decisions.

In general, Article 23-1B makes four major improvements to the City’s current Land Development Code:

- 1. Provides useful information about Department functions, while maintaining the City Manager’s flexibility to reassign functions and make needed changes.**

Article 23-1B seeks to balance the goal of informing the public about the functions of different City departments in the development process with the need for flexibility and the value of inter-departmental collaboration.

To achieve this balance, Article 23-1B clarifies that designations of department functions made throughout the Code may be reassigned as needed. It also

explains, in more detail than current Code, the inter-departmental review required for many types of applications and the areas of subject matter expertise that different City departments and officials exercise throughout all stages of the development process.

Additionally, Article 23-1B describes the City Council's role in development process, by listing the more significant types of legislative and quasi-judicial decisions for which the Council has final authority.

**2. Consolidates the Board & Commissions involved in development decisions into the Land Development Code and updates relevant Code sections.**

Under current Code, the enabling sections for City boards and commissions involved in the development process are codified outside the Land Development Code—in Chapter 2-1 (*City Boards*). To make the Code more user-friendly, Article 23-1B recodifies these sections into the Land Development Code. It also revises them to better describe the functions of each board and commission, with references to state law, and to more precisely delineate each body's legal authority.

It should be noted that, while the version of Article 23-1B in Draft 2 only includes the Board of Adjustment and Land Use Commission, which consists of the Planning Commission and the Zoning & Platting Commission, the CodeNEXT Team plans to incorporate the Environmental Commission, the Historic Land Use Commission, and the various technical code boards into Draft 3.

**3. Enables Council to establish a panel of the Board of Adjustment, for purposes of deciding appeals or other matters.**

State law allows cities to establish smaller panels of the Board of Adjustment, which exercise the same authority as the full Board. Panels can be useful for resolving more complex matters that are too time-consuming to consider by the full Board during regular meetings devoted to more typical variance applications.

Draft 2 provides a framework for Council to establish a panel of the BOA, which could be done by resolution or ordinance, in the event it becomes necessary due to concerns with the Board's caseload. However, a panel system could not be implemented without further action by Council.

**B. Significant Changes Between Drafts 1 & 2**

The revisions made to Chapter 23-1 (*Introduction*) in Draft 2 were fairly minor and do not change the overall effect of these provisions from Draft 1. However, a few revisions are worth noting:

- Section 23-1A-2030 (*Limitations on Authority*) includes new language, emphasizing that the Land Development Code controls over conflicting representations made by any City official.
- Section 23-1A-5020 (*Rules of Interpretation*) specifies that, unless otherwise noted, “days” means “calendar days.”
- Section 23-1B-2020 (*Board of Adjustment*) makes creation of the BOA Appeals Panel dependent on City Council approval, as discussed above.
- The table in Section 23-1B-3020 (*City Departments and Directors*) adds a description of the Environmental Officer, who is housed in the Watershed Protection Department.

## CHAPTER 23-2 (ADMINISTRATION AND PROCEDURES)

### A. Overview

Building on concepts established in Chapter 23-1 (*Introduction*), this chapter of CodeNEXT provides a detailed foundation for administering and enforcing the Land Development Code. As such, it performs many important functions, including:

- Establishing requirements for reviewing development applications, including submittal requirements, expirations, and public notice;
- Designating which chapters of the Land Development Code apply throughout the City and describing the types of development activity covered by the Code;
- Governing the conduct of public hearings required under the Land Development Code;
- Establishing procedures by which City boards and commissions may grant variances and exceptions from regulations, consistent with criteria established in later chapters of the Land Development Code;
- Authorizing responsible directors to relax certain provisions of the Land Development Code, based on clearly defined criteria and restrictions;
- Providing a comprehensive framework for administrative enforcement of the Land Development Code, including requirements for issuing stop work orders and revoking previously issued permits;
- Establishing requirements for appealing administrative decisions, including procedures and deadlines for filing appeals;
- Limiting the continuation of legally “nonconforming” uses and structures and restricting how they can be modified or expanded; and
- Providing for review of “vested rights” claims under state law, including application requirements and criteria for reviewing claims.

## **B. Summary of Key Provisions and Changes Between Drafts 1 & 2<sup>1</sup>**

Chapter 23-2 contains general administrative procedures that affect the overall implementation of the Code. The following overview summarizes these provisions, explains key issues they're intended to address, and responds to several of the public comments.

### **ARTICLE 23-2A: PURPOSE AND APPLICABILITY**

This article covers three important concepts that inform how regulations throughout the Land Development Code are applied:

- ***Applicability*** – Designates which parts of the City's overall jurisdiction, divided into the “zoning jurisdiction” and “extraterritorial jurisdiction,” are subject to particular regulations of the Land Development Code. *See* Section 23-2A-1020 (*Applicability*).
- ***Categories of Decisions*** – Describes the three broad categories of City decisions—Legislative, Quasi-Judicial, and Administrative—and how particular development applications are categorized. *See* Section 23-2A-1030 (*Overview of Legislative and Administrative Approvals*).
- ***Order of Process*** – Specifies the order in which approvals must be obtained, with allowances made for “concurrent” applications at the discretion of the responsible director. *See* Division 23-2A-2 (*Development Process*).

### **CodeNEXT Improvements:**

Article 23-2A expands on similar provisions currently found in Chapter 25-1 of the Land Development Code, with the goal of better explaining how the Code applies to development. The new applicability section, for example, is easier to read and avoids ambiguity. The order of process requirements align with CodeNEXT's hierarchy of decisions—Legislative, Quasi-Judicial, and Administrative—and specifically list development applications that fit within each category.

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<sup>1</sup> The following provisions of Chapter 23-2 are not covered by this report, because they are deemed to have minimal impact and/or are substantially similar to existing requirements of Land Development Code: Division 23-2E-2 (*Map and Plan Amendments*); Article 23-2H (*Construction Management and Certificates*); and Article 23-2M (*Definitions and Measurements*).

## **Significant Changes in Draft 2:**

The revisions made to Article 23-2A in Draft 2 were fairly minor and limited mainly to structural and stylistic issues. For example:

The main applicability provision, Section 23-2A-1020 (*Applicability*), was revised to better account for areas of the City that are annexed for the “limited purpose” of applying land use and development regulations. This is an improvement over the current Land Development Code, which doesn’t provide clear guidance on how the Code applies to limited purpose areas.

The provision describing the different categories of City decisions, Section 23-2A-1030, was streamlined a bit. Additionally, references to “level of discretion” was deleted from the overview table, but that concept is addressed in later sections of the Code.

## **ARTICLE 23-2B: APPLICATION REVIEW AND FEES**

This article governs the overall process for reviewing development applications and includes requirements related to:

- Who can file an application and how long they have to obtain approval before the application expires;
- The process by which City staff works with applicants to identify changes required to conform a proposed development to City Code;
- Grounds for “stopping the clock” on review periods, so that an application doesn’t expire while it’s awaiting review by a City board or commission or due to extra time required for staff to complete its review;

## **CodeNEXT Improvements:**

Both drafts of CodeNEXT have sought to more accurately align the Land Development Code with practices staff has found to be most effective and to more clearly describe how the review process works. Additionally, as with other administrative sections of the Code, Article 23-2B strikes a balance between establishing certain “bottom line” requirements in the Code itself, while leaving more detailed requirements for the responsible director to establish administratively.

## **Significant Changes in Draft 2:**

The changes made in Draft 2 were fairly minor and do not affect the overall substance of Article 23-2B. A few notable revisions include:

- Section 23-2B-1010 (*Application Requirements and Deadlines*) was amended to require that all administrative “rules and policy memos” be posted on the City’s website.
- 23-2B-1030 (*Application Completeness*) was revised to prevent applications subject to the Tenant Relocation Ordinance from being approved or posted for public hearing until after the required notification period.
- Section 23-2B-1030 was also revised to accurately reflect the 10-day deadline required by state law for conducting “completeness check” of development applications, which corrects an error made in Draft 1.

Staff has identified a handful of changes to these sections that are being considered for inclusion in Draft 3, including a revision to Division 23-2B-3 (*Fees and Fiscal Surety*) that would authorize the use of “alternative fiscal” subject to the director’s approval. Alternative fiscal, which is used in several jurisdictions, provides a more flexible means of securing an applicant’s obligation to complete required infrastructure by drawing down posted funds as work is completed.

## **ARTICLE 23-2C: PUBLIC NOTICE**

Providing public notice is a critical step in the development process. Consistent with its commitment to civic engagement in land use planning, the City of Austin has long provided more public notice than required by state law. Both the current Land Development Code and CodeNEXT require that notice be provided: (1) a greater distance from proposed development than mandated by state law; and (2) for certain applications and decisions that do not require any notice under state law.

## **CodeNEXT Improvements:**

Article 23-2C carries forward most of the substantive notice requirements found in the current Land Development Code and is not intended to reduce the level of

public notice currently provided. However, CodeNEXT seeks to make the City’s notice requirements clearer and more user-friendly by introducing:

- A consolidated table, codified in Section 23-2C-1020 (*Summary of Notice Requirements*), that summarizes the major notice requirements found throughout the Land Development Code; and
- Easy, uniform terminology to describe the different categories of notice required—i.e., Type 1 Notice, for specific projects, and Type 2 Notice, for legislative matters not associated with a particular property. *See* Sections 23-2C-4020 & 23-2C-4040; and
- Authorization for the use of emailed notice, except where state law requires notice to be provided by mail.

Additionally, under the current Land Development Code, the concept of “Interested Party” serves several legally distinct functions which are blended together in a single provision that does not accurately reflect existing practices. To address these issues, CodeNEXT proposes the following overall changes:

- Section 23-2C-2020 streamlines the requirements for being an interested party so that the term only captures the universe of people legally entitled to notice, whether or not they register to receive it, based on their proximity to a proposed development for which notice is required.
- The new term “Registered Party,” covered by Section 23-2C-2030, captures the universe of people entitled to notice because they registered with the City in connection with a pending application.
- The requirement to “communicate an interest” in a matter, by specifically stating one’s objections to a pending application, is no longer a general requirement for being an interested party as it is under current Code. Rather, CodeNEXT limits the requirement to “communicate an interest” to certain types of administrative appeals filed under Article 23-2I.

Please note that staff and the consultant team are considering further refinements to the notice and interested party requirements, in response both to public comment and further internal review. Additional revisions will likely be included in Draft 3.

## **Significant Changes in Draft 2:**

Most of the changes made to Article 23-2C in Draft 2 were stylistic and do not change the substance of the requirements from Draft 1. However, one change is worth noting:

- In Draft 1, Section 23-2C-2030 used the term “Courtesy Notice” to capture those cases where notice is provided because a person registered with the City to receive it.
- Draft 2 uses the revised term “Registered Parties” and changes the requirements to clarify that: (1) a registered party is entitled to notice of all public hearings and administrative decisions for which an interested party is entitled to notice; (2) a person may not register for notice of future permits or matters not subject to a pending application; and (3) notice to a registered party may be provided by email.

One public comment recommended deleting language in Section 23-2C-2010 (*Notice Required*) specifying that failure to receive notice is not grounds for invalidating a decision, except to the extent required by state law. Staff recommends keeping this language, which is consistent with similar provisions found in other development codes.

## **ARTICLE 23-2D: PUBLIC HEARINGS**

This article governs how public hearings required under the Land Development Code are scheduled and conducted. It does not differ substantially from procedures established in current Code, but does make several minor changes.

### **CodeNEXT Improvements:**

Section 23-2D-2010 (*Scheduling Public Hearings*) more clearly describes the responsible director’s authority to schedule a public hearing before a board or commission. Additionally, it authorizes the City Manager to schedule public hearings before the City Council unless the Council acts to schedule a hearing on its own initiative. This provision would eliminate the need for Council to “set public hearings” on land use matters, although Council would retain that authority if it chose to do so.

## **Significant Changes in Draft 2:**

Staff carefully considered public comment, but did not make any significant changes to Article 23-2D in Draft 2.

One public comment recommended eliminating Section 23-2D-2030 (*Change of Location of Public Hearings*), which provides flexibility for staff to relocate public hearings to a nearby location if the originally scheduled location is unavailable. This provision, which exists in current Code, is rarely used, but is important to retain in order to preserve the City's ability to meet deadlines specified by law or avoid delays that may compromise the City's interests.

Other comments suggested codifying certain longstanding conventions for requesting postponement of public hearings. While these conventions play an important role in the process, they should remain uncoded in order to preserve the City's authority over the scheduling and conduct of public hearings.

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## **DIVISION 23-2E-1: TEXT AMENDMENTS**

This division addresses the process by which amendments to the text of the Land Development Code are initiated and considered.

### **CodeNEXT Improvements:**

The Land Development Code requires that Code amendments be “initiated” by either the City Council or Planning Commission, which means that City staff cannot process an ordinance amending the Code or schedule it for public hearing unless one of those bodies has given formal direction to do so. This initiating authority is preserved in Draft 2.

Division 23-2E-1 describes the process for initiating Code amendments more fully than the current Land Development Code, in order to address confusion that occasionally arises as to the proper method for initiating amendments and the appropriate level of detail to include. Section 23-2E-1010 (*Purpose, Applicability, and Policy Statement*) also includes a non-binding policy directive that delineates circumstances in which Code amendments are generally discouraged.

Additionally, Division 23-2E-1 fleshes out the boards and commissions review process required for Code amendments and gives the Building Official authority to independently initiate amendments to technical codes. Section 23-2E-1030 (*Adoption by Council*) clarifies that Council may waive boards and commission review required for a Code amendment, except in cases where commission review is required by state law (e.g., amendments to zoning or subdivision requirements).

### **Significant Changes in Draft 2:**

Other than a few minor corrections, no changes were made to Division 23-2E-1 in Draft 2.

## **ARTICLE 23-2F: QUASI-JUDICIAL AND ADMINISTRATIVE RELIEF**

Article 23-2F establishes uniform procedures for requesting that requirements of the Land Development Code be relaxed or modified to address unique or unusual circumstances. It includes three separate divisions:

- Division 23-2F-1 (*Variances and Special Exceptions*), which is largely consistent with current Code, pertains to relief granted by City boards and commissions;
- Division 23-2F-2 (*Administrative Relief Procedures*) includes new provisions authorizing the responsible director to modify or reduce regulatory requirements; and
- Division 23-2F-3 (*Limited Adjustments*) authorizes the City Council to grant relief from the City's watershed regulations in cases where doing so is necessary to protect a landowner's legal rights.

### **CodeNEXT Improvements:**

Following is a summary of more significant differences between Article 23-2F and current provisions of the Land Development Code.

#### **1. Division 23-2F-1 (*Variances and Special Exceptions*)**

This division groups together common procedural requirements applicable to zoning variances and special exceptions considered by the Board of Adjustment and environmental variances considered by the Land Use Commission. It is important to note that, as with Chapter 25-1 in the current Land Development Code, Article 23-2F is limited to notice, application, and decision-making procedures that apply to all variances and exceptions. The actual criteria required for different kinds of variances and exceptions are codified with the substantive regulations authorizing the variance.

Article 23-2F does not significantly change existing procedures established in the Land Development Code. However, it does make several important refinements:

- Section 23-2F-1010 more fully describes the differences between variances and special exceptions.

- Section 23-2F-1020 (*Limitations and Legal Effect*) clarifies that variances or special exceptions cannot be used to waive or rewrite Code requirements and explains the legal effect of obtaining a variance or exception.
- Section 23-2F-1060 (*Conditions and Modifications*) clarifies the authority of the Board of Adjustment and the Land Use Commission to approve applications and impose conditions.

## 2. **Division 23-2F-2 (*Administrative Relief Procedures*)**

Division 23-2F gives the responsible director greater authority than exists under current Code to relax regulatory requirements in response to a variety of different circumstances and conditions. Following is a summary of each of the three main sections:

- **Section 23-2F-2020 (*Exempt Residential Uses and Structures*)**

This provision is similar in concept to existing Section 25-1-365 (*Exemption From Compliance*), which authorizes the Building Official to approve “amnesty certificates of occupancy” for older structures that were not properly permitted, but don’t threaten public health and safety. Like the existing Amnesty CO provision, which was adopted with the last major rewrite of the Land Development Code in mid-1980s, Section 23-2F-2020 would provide relief for certain older structures that predate CodeNEXT and do not comply with applicable regulations.

However, while the two provisions serve similar purposes, Section 23-2F-2020 differs from the existing Amnesty CO provision in four significant ways:

- ✓ Only Applies to Residential Uses of Nine or Fewer Units. Section 23-2F-2020 applies only to residential uses or structures that consist of no more than nine dwelling units. This is a narrower scope than the existing Amnesty CO provision, which covers commercial as well as residential uses and includes no unit cap.
- ✓ Moves the Cutoff Date From 1986 to 2008. The cutoff date for eligibility under Section 23-2F-2020 is January 1, 2008, which means that a use or structure must have existed on or before that date in order to qualify for relief. This revised cutoff date captures a more recent timeframe than the March 1, 1986 cutoff required by the existing Amnesty CO provision.

However, while that provision granted relief to structures built right before adoption of the last new Land Development Code in 1986, the 2008 cutoff required under Section 23-2F-2020 would limit relief to structures built at least 10 years before potential adoption of CodeNEXT in 2018.

- ✓ Uses Need Not be Permitted or Nonconforming, but Must Be Residential and Have No More Than Nine Units. While the existing Amnesty CO provision is limited to uses that are permitted or nonconforming, Section 23-2F-2020 would cover any residential use of nine or fewer units.
- ✓ Structures or Uses Granted Relief Would Become Legally Nonconforming. Current code is silent on the status of structures for which an Amnesty CO is issued. Section 23-2F-2020 requires all uses and structures receiving a CO be treated as nonconforming. This would limit expansions or alterations, consistent with the requirements of Article 23-2G (*Nonconformity*).

- **Section 23-2F-2030 (*Minor Adjustments*)**

This section authorizes the responsible director or building official to approve construction that exceeds a height, setback, or building coverage requirement by no more than 10 percent. Minor adjustments are limited to errors made in good faith, due to unforeseen site conditions or other circumstances beyond the applicant's control. Additionally, minor adjustments cannot be approved with a building permit or site plan and are limited to errors discovered in conducting required inspections.

- **Section 23-2F-2040 (*Alternative Equivalent Compliance*)**

This section is similar in scope and effect to provisions for alternative equivalent compliance ("AEC") authorized under Subchapter E (*Design Standards and Mixed Use*) of the City's current zoning code. Like the existing provision, Section 23-2F-2040 authorizes AEC only for design-related requirements applicable to commercial and mixed use projects and does not authorize relief from base zoning district regulations.

Section 23-2F-2040 establishes much clearer criteria and procedures for staff's review of AEC requests than exist in Subchapter E, including authority to impose conditions and requirements for documenting decisions.

- **Division 23-2F-3 (*Limited Adjustments*)**

“Limited Adjustments” are a creature of the citizen-initiated Save Our Springs Ordinance (“SOS”), adopted by referendum in 1992 and historically available only within the Barton Springs Zone. Limited adjustments are the only authorized means of altering the requirements of SOS, other than a Code amendment, and are limited to cases where application of SOS would affect a “taking” or otherwise violate a landowner’s legal rights.

The only significant change in Section 23-2F-2050 is that it would allow limited adjustments to be requested outside of the SOS area. Staff recommends this change because it furthers the goal of uniformity to have a standard process available for resolving takings claims in all watersheds. However, based on requirements of the SOS Ordinances, limited adjustment within the Barton Springs Zone would continue to require a 3/4<sup>th</sup> super-majority vote to approve.

**Significant Changes in Draft 2:**

No significant changes were made to Article 23-2F in Draft 2. However, staff did carefully consider the public comments as well as detailed reports prepared by the League of Women Voters.

Several comments were critical of provisions in Division 23-2F-2 (*Administrative Relief Procedures*), which give the responsible director greater authority than currently exists to relax development standards administratively. Staff believes the new provisions would help focus City resources on more significant violations and address concerns raised in the Zucker Report and the Code Diagnosis Report, both of which generally criticized the existing Land Development Code as overly prescriptive. Additionally, Division 23-2F-2 provides clear standards for granting relief that limit the applicability of these provisions to specifically defined circumstances.

## ARTICLE 23-2G: NONCONFORMITY

The provisions in Article 23-2G limit the continuation, expansion, and modification of structures that do not comply with current regulations, but did comply at the time they were permitted. The changes proposed to these provisions in CodeNEXT, while significant, are not a substantial departure from current regulations in terms of the overall limitations on expanding or modifying nonconforming uses or structures.

### **CodeNEXT Improvements:**

Following is a general summary of the most significant changes between Article 23-2G and the City's current regulations of nonconforming uses and structures:

- ***Uniform Terminology.***

CodeNEXT uses the term “nonconforming” to describe both uses and structures, rather than referring to structures as “noncomplying.” This is consistent with terminology used in other jurisdictions and reflects the way staff, applicants, and interested parties discuss issues of nonconformity.

- ***Clarifies Review Procedures and Appeal Rights.***

CodeNEXT clarifies the requirements for requesting a determination of “nonconforming status” and provides that such determinations may be appealed to the Board of Adjustment. *See* Section 23-2G-1030 (*Determination of Nonconforming Status*).

- ***Streamlines the Requirements Applicable to Nonconforming Uses.***

CodeNEXT largely retains the limitations applicable to nonconforming structures under current Code, including limits on removal of walls. *See* Section 23-2G-1070. However, Article 23-2G eliminates the “Non-Conforming Use Regulation Groups” established under current Code. The result, staff believes, is a simpler set of regulations that will continue to prohibit significant expansions to nonconforming uses. *See* Section 23-2G-1050 (*Continuation of Nonconformity*).

It was suggested recently that CodeNEXT may have eliminated amortization provisions that require terminating nonconforming uses after a specified period of time. However, the only amortization date established in current Code is limited

to certain outdoor uses and to structures valued at a lower amount than would likely apply today.

- ***Includes Requirements Specific to “Nonconforming Lots.”***

To ensure consistent terminology, CodeNEXT uses the term “nonconforming lot” instead of “substandard lot” to describe legally platted lots that are too small to meet current minimum lot area requirements. In terms of its substantive restrictions, however, CodeNEXT is substantially similar to current Code. See Sections 23-2G-1020(C) (*Nonconforming Status*) and 23-2G-2020 (*Nonconforming Lots*).

- ***Extends Nonconformity Requirements To Non-Zoning Regulations.***

Under current Code, the general restrictions applicable to nonconforming uses and structures are limited to cases of noncompliance with zoning regulations. However, issues of nonconformity frequently arise in other contexts as well, such as where a structure does not meet current watershed or drainage regulations but did meet the regulations applicable at the time it was constructed.

By extending the concept of nonconformity to other site development regulations of the Land Development Code, besides just zoning district regulations, Article 23-2G clarifies staff’s authority to limit modifications that increase the degree of nonconformity with other kinds of City regulations. See Sections 23-2G-1010(B)(2) (*Purpose and Applicability*); 23-2G-1020(B)(2) (*Nonconforming Status*).

- ***Eliminates “Safe Harbor” For Properties Complying Immediately Prior to Adoption of CodeNEXT.***

Under current Code, structures and uses that complied with applicable regulations on March 1, 1984 were deemed “conforming” even if they would otherwise be treated as nonconforming under requirements of the new Land Development Code adopted in 1986.

Staff recommends eliminating this approach in CodeNEXT, because it adds unneeded complexity to the review process and may have the effect of exempting certain properties from rules limiting the expansion or modification of uses and structures that don’t comply with current regulations. Additionally, because

CodeNEXT generally allows nonconformities to continue and be maintained, a “safe harbor” provision is not necessary to protect landowner rights.

**Significant Changes in Draft 2:**

A few minor revisions have been made to Article 23-2G, to correct errors and clarify the language. The only significant change is the addition of new Section 23-2G-2050 (*Nonconforming Short-Term Rental Use*). This provision, which is consistent with current Code, provides for the mandatory termination of Type 2 STRs by April 1, 2022.

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## ARTICLE 23-2I: APPEALS

Article 23-2I comprehensively revises the City's existing appeals process with the goal of establishing a fair and orderly system that protects the rights of all parties to administrative appeals. To this end, it seeks to address numerous ambiguities, conflicts, and errors in the appeals process established under the current Land Development Code.

These problems have had the greatest impact on appeals of staff-level administrative decisions, including permits, site plans, and enforcement orders which affect approved developments. Following is a summary of several major issues that CodeNEXT seeks to address:

- *Ambiguous, conflicting, and incorrect provisions regarding what decisions may be appealed and lack of clarity as to when the clock starts to run for purposes of calculating the deadline.*
- *Assigning certain kinds appeals to boards and commissions without proper legal authority to consider the appeal.*
- *Authorizing redundant appeals to different boards and commissions.*
- *Lack of clearly specified authority to reject appeals that are untimely or fail to meet basic procedural requirements.*

### **CodeNEXT Improvements:**

Article 23-2I makes several important changes to the appeals process:

- **Section 23-2I-1020 (*Appeal of Administrative Decisions*)**

Establishes clear requirements for who is entitled to appeal different types of administrative decisions. Minor changes to this provision may be proposed for Draft 3, in response to public comment and ongoing staff review.

- **Section 23-2I-1030 (*Deadline for Appeal*)**

Clarifies the deadlines for filing administrative appeals based on whether the decision being appealed is subject to public notice. The deadlines established in this section are generally consistent with current Code.

- **Section 23-2I-1040 (*Development Not Permitted During Appeal*)**

Maintains existing requirements that prohibit development from occurring during an appeal, but makes limited allowances for work that is deemed necessary to protect public health and safety and routine site work that is unrelated to the appeal.

- **Division 23-2I-2 (*Initiating and Process of Appeals*)**

Establishes clear procedures for filing appeals and provides specific direction regarding which City board or commission is authorized to consider appeals. Consistent with state law, this section delegates to the Board of Adjustment sole authority to consider appeals of administrative decisions relating to the administration or enforcement of zoning regulations.

- **Division 23-2I-3 (*Notification and Conduct of Public Hearing*)**

Addresses numerous issues that have arisen in managing the appeals process, including order of presentations, deadlines for submitting materials, ex parte contacts, and notice of public hearings and decisions.

**Significant Changes in Draft 2:**

As with many provisions in Chapter 23-2, detailed and thoughtful public comment was provided on Article 23-2I. Staff is continuing to evaluate potential changes in response to comments and will likely include further revisions in Draft 3 to address particular concerns.

However, staff believes that the changes in Article 23-2I would help to ensure a more orderly appeals process and disagrees with some of the comments recommending that the existing process be retained. For example, one comment objected to removing an existing Code provision which requires that bodies hearing an appeal decide whether a party has “standing” to appeal.

In staff’s view, the clarifications in Article 23-2I make standing a non-issue. If an appeal is authorized, is timely filed, and meets other applicable procedures, then it should be posted and the body hearing the appeal should consider the merits of the case. If the appeal is not authorized, is untimely, or fails to meet applicable procedures, then the appeal should not be considered and any development affected by the appeal should be allowed to proceed.

Another concern was that Section 23-2I-2030 makes the “meeting to resolve issues” optional, rather than mandatory. In staff’s experience, parties to an appeal often have intractable positions. Staff cannot force parties to meet and the Code should not impose that obligation.

## **ARTICLE 23-2J: ENFORCEMENT**

This article establishes requirements for administratively enforcing the Land Development Code through issuance of stop work orders and revocations of development permits and certificates of occupancy.

### **CodeNEXT Improvements:**

Article 23-2J provides greater flexibility for enforcing the Land Development Code, while continuing to afford landowners due process in the form of notice and an opportunity to appeal. The new provisions streamline the process and eliminate redundant steps that served no clear purpose, such as the provision of current Code requiring that suspension always precede revocation and that both steps be subject to separate rights of appeal.

Additionally, in light of past difficulties with enforcing certain provisions of the Code, Article 23-2J more clearly defines what constitutes a “violation” to include: (1) unpermitted development, whether or not it otherwise complies with applicable requirements; and (2) violation of development conditions imposed in connection with approval of a variance, conditional use site plan, or other discretionary approval.

As mentioned in the summary of Article 23-2I (*Appeals*), above, the new provisions consolidate enforcement appeals with any separate appeal challenging the approval of a permit.

### **Significant Changes to Draft 2:**

Staff has proposed no changes Article 23-2J in Draft 2.

## **DIVISIONS 23-2L-1 & 2: DEVELOPMENT AGREEMENTS**

These divisions of CodeNEXT establish requirements for two distinct kinds of development agreements: (1) “Interlocal development agreements,” which would provide a means of tailoring regulations to accommodate the needs of other governmental entities that are subject to City regulations; and (2) “General development agreements,” which are authorized under state law in connection with annexation.

### **CodeNEXT Improvements:**

Division 23-2L-1 (*Interlocal Development Agreements*) is largely consistent with existing provisions of the Land Development Code, but more fully describes the process for initiating an agreement and includes other minor revisions and process improvements. The City currently has an interlocal “land standards agreement” with AISD and other school districts, which are specifically authorized under state law. However, potential agreements with other governmental bodies have been discussed from time to time and these amendments would establish a framework for considering them in the future.

Consistent with authority provided under state law, Division 23-2L-2 (*General Development Agreements*) establishes procedures for executing development agreements with landowners as part of the annexation process. As with interlocal development agreements, a general development agreement would require Council initiation and approval as well as review by the Land Use Commission.

### **Significant Changes in Draft 2:**

No significant changes are proposed to Divisions 23-2L-1 or 23-2L-2 in Draft 2.

## **ARTICLE 23-2K VESTED RIGHTS**

Article 23-2K contains the City’s basic procedures for evaluating whether a development application is legally entitled to be reviewed under regulations in effect before the date the application was filed with the City. Claims that a project is vested to earlier regulations, often called “grandfathering,” are usually based on Chapter 245 or Section 43.002 of the Texas Local Government Code.

### **CodeNEXT Improvements:**

CodeNEXT does not seek to substantially alter these provisions, which Council adopted in 2014, and has no impact on the substantive standards by which vested rights claims are evaluated. However, Draft 2 does include minor changes intended to improve the process by which vested rights claims are reviewed and provide greater flexibility for processing more complex cases.

### **Significant Changes in Draft 2:**

The changes in Draft 2 were minor and consisted primarily of correcting typographical errors. Two of the more significant changes were:

- Section 23-2K-2010(D) was revised to allow more time for reconsideration, which is sometimes necessary in more complex cases.
- Section 23-2K-2040(B) was revised to allow the director to consider requests for project consent agreements at any time after a vested rights determination is made.

Further changes may be proposed in Draft 3, in order to increase efficiency of the review process and avoid unnecessary levels of review for claims that are less complex. Additionally, staff will continue to review public comment and anticipates incorporating several proposed revisions into Draft 3.

## CHAPTER 23-5 (SUBDIVISION)

Draft 2 proposes a substantial rewrite of the City’s subdivision regulations, in order to more clearly define this important step in the development process. However, CodeNEXT proposes no significant changes to the development standards imposed at subdivision; rather, the revisions in Chapter 23-5 are focused primarily on process and administration.

### **CodeNEXT Improvements:**

Following is a summary of the major changes to Chapter 23-5 proposed in Draft 2.. Most of these changes are similar to provisions that appear in other municipal development codes and are intended to provide a more through description of the subdivision process.

For example, Section 23-5A-1010(B) and 1040(C) clarifies what actions constitute a “subdivision” and what types of land divisions are not subject to the City’s subdivision regulations. These provisions are consistent with traditional platting concepts, which are not well-defined under current Code. Additional improvements in Chapter 23-5 include:

- *Establishes what actions constitute a violation of Chapter 23-5, the effect of a violation, and the limited range of activities that are allowed on unplatted tracts that have not received a “land status” determination.*
- *Clarifies the existing process for obtaining a “land status” determination, which exempts a tract from the requirement to plat.*
- *Replaces the Code’s existing “Balance of the Tract” requirement with a “Remainder Tract” requirement that is similar in its overall effect (i.e., limiting split parcels), but is more consistent with approaches used by other cities.*
- *More clearly explains the process for “statutory disapprovals” and links that process to procedures established in Chapter 23-2.*
- *Describes the variance process in greater detail, including the different types of variances that may be requested and the standards for approval.*

- *Provides guidance related to the use of “plat notes,” which incorporates certain existing provisions of the Land Development Code but adds additional requirements intended to address certain longstanding issues.*
- *Explains preliminary plans more fully, including the purposes that they’re intended to serve and the standards for approval.*
- *Establishes clearer requirements for final plats, including their relationship to preliminary plans and legal requirements for recordation.*
- *Clarifies the role of “master development plans,” which are authorized under current Code but not clearly defined.*
- *Revises provisions found in Draft 1 relating to “amending plats,” “minor plats,” “plat revisions,” “resubdivisions,” and “plat vacations” to better reflect applicable provisions of state law.*

Staff anticipates offering further revisions to Chapter 23-5 with Draft 3, in response to ongoing internal review and comments from stakeholders.